

6/13/2011

ORDINANCE NO. 49-023

AN ORDINANCE AMENDING SECTIONS 11.38.150, 11.38.155 AND 11.38.157 OF THE CODE OF THE CITY OF WICHITA, KANSAS, PERTAINING TO DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS ILLEGAL AND REPEALING THE ORIGINALS OF SAID SECTIONS.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF WICHITA, KANSAS:

SECTION 1 Section 11.38.150 of the Code of the City of Wichita, Kansas, is hereby amended to read as follows:

“Driving under the influence of alcohol and/or drugs unlawful—

Penalty. (a) No person shall operate or attempt to operate any vehicle within the city while:

(1) The alcohol concentration in the person's blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle is .08 or more;

(2) Under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(3) The alcohol concentration in the person's blood or breath as shown by any competent evidence is .08 or more. For the purposes of this section, "any competent evidence" includes (1) Alcohol concentration tests obtained from samples taken three hours or more after the operation

or attempted operation of a vehicle, and (2) readings obtained from a partial alcohol concentration test on a breath testing machine;

(4) Under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) Under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle.

(6) If the person is a habitual user of any narcotic, hypnotic, omnificent or stimulating drug.

(b) Violation of this section is a misdemeanor. Upon a first conviction of a violation of this section, a person shall be sentenced to not less than forty-eight consecutive hours nor more than six months imprisonment or, in the court's discretion, one hundred hours of public service, and fined not less than seven hundred fifty dollars nor more than one thousand dollars. The person convicted shall serve at least forty-eight consecutive hours' imprisonment or one hundred hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole. The court may place the person convicted under a house arrest program pursuant to section 249 of Chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served forty-eight consecutive hours' imprisonment.

(c) On a second conviction of a violation of this section, a person shall be sentenced to not less than ninety days nor more than one year imprisonment and fined not less than one thousand two hundred fifty dollars nor more than one

thousand seven hundred fifty dollars. The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served forty-eight consecutive hours' imprisonment; provided, such work release program requires such person to return to confinement at the end of the each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of one hundred twenty hours of confinement. Such one hundred twenty hours of confinement shall be a period of at least forty-eight consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to Section 249 of Chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served forty-eight consecutive hours' imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of one hundred twenty hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the one hundred twenty hours.

(d) On a third offense, unless such person has a prior conviction which occurred within the preceding ten years, not including any period of incarceration,

the person convicted shall be sentenced to not less than ninety days nor more than one year's imprisonment and fined not less than one thousand seven hundred fifty dollars nor more than two thousand five hundred. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least ninety days' imprisonment. The ninety days' imprisonment mandated by this subsection may be served in a work release program only after such person has served forty-eight consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of two hundred forty hours of confinement. Such two hundred forty hours of confinement shall be a period of at least forty-eight consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to section 349 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served forty-eight consecutive hours imprisonment, the person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of two hundred forty hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the two hundred forty hours.

(e) In addition, prior to sentencing for any conviction, the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendations made by the provider after such evaluation, unless otherwise ordered by the court.

(f) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(g) Any person convicted of violating this section who had one or more children under the age of fourteen years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other minimum mandatory penalty imposed for a violation of this section. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(h) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than ninety days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(i) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to

five dollars for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(j) Except as provided in paragraph (4), in addition to any other penalty which may be imposed upon a first conviction of a violation of this section, the court may order that the convicted person's motor vehicle or vehicles be impounded or immobilized for a period of one year and that the convicted person pay all towing, impoundment and storage fees or other immobilization costs.

(1) The court shall not order the impoundment or immobilization of a motor vehicle driven by a person convicted of a violation of this section if the motor vehicle had been stolen or converted at the time it was driven in violation of this section;

(2) Prior to ordering the impoundment or immobilization of a motor vehicle or vehicles owned by a person convicted of a violation of this section, the court shall consider, but not be limited to, the following:

a. Whether the impoundment or immobilization of the motor vehicle would result in the loss of employment by the convicted person or a member of such person's family; and

b. Whether the ability of the convicted person or a member of such person's family to attend school or obtain medical care would be impaired.

(3) Any personal property in a vehicle impounded or immobilized pursuant to this subsection may be retrieved prior to or during the period of such imprisonment or immobilization.

(4) As used in this subsection, the convicted person's motor vehicle or vehicles shall not include any vehicle leased by such person. If the lease on the convicted person's motor vehicle subject to impoundment or immobilization expires in less than one year from the date of the impoundment or immobilization, the time of impoundment or immobilization of such vehicle shall be the amount of time remaining on the lease.

(k) The court shall electronically report every plea of guilty or conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings or a complaint alleging a violation of this section to the Kansas Bureau of Investigation Central Repository. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the Division and Kansas Bureau of Investigation, a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of the state.

(l) For the purpose of determining whether a conviction is a first, or second, in sentencing under this section:

(1) 'Conviction' includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(2) 'Conviction' includes being convicted of a violation of a law of this state or of another state, or an ordinance of any city or resolution of any county which prohibits the acts that this section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(3) Only convictions occurring on or after July 1, 2001 shall be taken into account when determining the sentence to be imposed for a first or second offender.

(4) It is irrelevant whether an offense occurred before or after conviction for a previous offense.

(5) A person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, or a state statute or ordinance which prohibits the acts of this section, and amendments thereto, only once during the person's lifetime.

(m) Suspension, restriction or suspension and restriction of the driving privileges of a person convicted of a violation of this section should be done in accordance with the provisions of K.S.A. 8-1014 and 8-1015, and amendments thereto.

(n) The court shall be authorized to order any person convicted of a violation of this section to pay restitution to any victim who has suffered loss due to the violation for which the person was convicted.

(o) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section to avoid the mandatory penalties established by this section. For the purpose of this subsection, entering into a diversion agreement established pursuant to K.S.A. 12-4413 et seq. and amendments thereto, shall not constitute plea bargaining.

(p) The alternatives set out in subsections (a)(1), (2) and (3) of this section may be pleaded in the alternative, and the city may, but shall not be required to, elect one or two of the three prior to submission of the case of the fact finder.

(q) For the purpose of this section:

(1) 'Alcohol concentration' means the number of grams of alcohol per one hundred milliliters of blood or per two hundred ten liters of breath;

(2) 'Imprisonment' includes any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the city council.

(3) 'Drug' includes toxic vapors.

(4) 'Toxic Vapors' are defined as including the following substances or products containing such substances: (a) Alcohols, including

methyl, isopropyl, propyl or butyl; (b) Aliphatic acetates, including ethyl, methyl, propyl or methyl cellosolve acetate; (c) acetone; (d) Benzene (e) Carbon tetrachloride; (f) Cyclohexane; (g) Freons, including freon 11 and freon 12; (h) Hexane; (i) Methyl ethyl ketone; (j) Methyl isobutyl ketone (k) Naptha; (l) Perchlorethylene; (m) Toluene; (n) Trichloroethane; and/or Xylene.

(r) Should any court declare any subsection, clause or provision of this section to be unconstitutional, such decision shall affect only such subsection, clause or provision so declared unconstitutional and shall not affect any other subsection, clause or provision of this section.

(s) The Municipal Court shall have jurisdiction over a violation of this section occurring prior to July 1, 2011, and on or after July 1, 2006, which is concurrent with the jurisdiction of the district court for violation of K.S.A. 8-1567, and amendments thereto, notwithstanding that the elements of this section are the same as the elements of K.S.A. 8-1567, and amendments thereto, that would constitute, and be punished as a felony.”

SECTION2. Section 11.38.155 of the Code of the City of Wichita, Kansas, is hereby amended to read as follows:

"Driving a commercial vehicle while under the influence of alcohol and/or drugs illegal—Penalty—Testing and reporting.

(a) No person shall operate any commercial motor vehicle, as defined in K.S.A. 8-2, 128, and amendments thereto, within the city while:

(1) the alcohol concentration in the person's blood or breath, as shown by any competent evidence, including other competent evidence, as

defined in paragraph (1) of subsection (f) of K.S.A. 8-1013, and amendments thereto, is .04 or more;

(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of driving a commercial motor vehicle, is .04 or more; or

(3) committing a violation of Section 11.38.150, and amendments thereto.

(b) Violation of this section is a misdemeanor. Upon a first conviction of a violation of this section, a person shall be sentenced to not less than forty-eight consecutive hours nor more than six months imprisonment or, in the court's discretion, one hundred hours of public service, and fined not less than seven hundred fifty dollars nor more than one thousand dollars. The person convicted must serve at least forty-eight consecutive hours' imprisonment or one hundred hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole.

(c) On a second conviction of a violation of this section, a person shall be sentenced to not less than ninety days nor more than one year's imprisonment and fined not less than one thousand two hundred fifty dollars (\$1,250.00) nor more than one thousand seven hundred fifty dollars. The person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served forty-eight consecutive hours' imprisonment, provided such work release program requires such person to

return to confinement at the end of the each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of one hundred twenty hours of confinement. Such one hundred twenty hours of confinement shall be a period of at least forty-eight consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to section 249 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served forty-eight consecutive hours' imprisonment. The person convicted, if placed under house arrest shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of one hundred twenty hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement, shall not be counted as part of the one hundred twenty hours.

(1) In addition, prior to sentencing for any conviction, the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendment thereto. The person shall be required to follow any recommendations made by the provider after such evaluation, unless otherwise ordered by the court.

(d) Any person convicted of a violation of this section who had one or more children under the age of fourteen years in the vehicle at the time of the

offense shall have such persons' punishment enhanced by one month of imprisonment. This imprisonment shall be served consecutively to any other minimum mandatory penalty imposed for a violation of this section. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(e) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(f) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than ninety days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(g) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to \$5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or any an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(h) The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of the section, the court shall request and shall receive from the: (1) Division a record of all prior convictions obtained against such person for any violation of any of the motor vehicle laws of this state; and (2) Kansas Bureau of Investigation central repository all criminal history record information concerning such person.

(i) For the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(1) 'Conviction' includes being convicted of a violation of a law of another state or an ordinance of any city or resolution of any county, which prohibits the acts that this section prohibits'

(2) any convictions occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first, second, third or subsequent offender; and

(3) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

(j) For the purpose of this section:

(1) 'Alcohol concentration' means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(2) 'imprisonment' shall include any restrained environment in which the court and law enforcement agency intend to retain custody and

control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city; and

(3) 'drug' includes toxic vapors as such term is defined in K.S.A. 2010 Supp. 21-36a12, and amendments thereto.

(k) Whenever a law enforcement officer has reasonable ground to believe a person has been driving a commercial motor vehicle in violation of the provisions of this section, such officer shall follow the procedures for notice, testing, and certification of test refusal or results as set forth in K.S.A. 8-2, 145 and amendments thereto.

(l) It shall not be a defense that the person did not understand the notices required by this section."

SECTION 3. Section 11.38.157 of the Code of the City of Wichita, Kansas, is hereby amended to read as follows:

"Refusal to submit to a preliminary breath test—Penalty.

(a) A law enforcement officer may request a person who is operating or attempting to operate a vehicle within this state to submit to a preliminary screening test of the person's breath, saliva, or both if the officer has reasonable grounds to believe that the person: (1) has alcohol in the person's body; (2) has committed a traffic infraction; or (3) has been involved in a vehicle accident or collision.

(b) At the time the test is requested, the person shall be given oral notice that: (1) There is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3)

further testing may be required after the preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test.

(c) Refusal to take and complete the test as requested is a traffic infraction punishable by a fine not more than five hundred dollars. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

(d) Any preliminary screening of a person's breath shall be conducted with a device approved pursuant to K.S.A. 65-1,107 and amendments thereto. Any preliminary screening of a person's saliva shall be conducted with a device approved pursuant to Section 2, of 2010 House Substitute for Senate Bill No. 6."

SECTION 4. The originals of Sections 11.38.150, 11.38.155 and 11.38.157 and of the Code of the City of Wichita, Kansas, are hereby repealed.

SECTION 5. This ordinance shall be included in the Code of the City of Wichita, Kansas, and shall be effective upon its passage and publication once in the official city paper.

PASSED by the governing body of the City of Wichita, Kansas, this 21st day of June,
2011.

Carl Brewer, Mayor

ATTEST:

Karen Sublett, City Clerk

Approved as to Form:

Gary E. Rebenstorf
Director of Law